



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAY 31 2006

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

Mr. Edward H. Murphy  
American Petroleum Institute  
1220 L Street, Northwest  
Washington, DC 20005-4070

Dear Mr. Murphy:

This letter is in response to requests by several refiners and importers that the United States Environmental Protection Agency exercise its enforcement discretion to provide regulated parties with compliance flexibility pending implementation of a number of requirements set forth in EPA's Technical Amendments to the Highway and Nonroad Diesel Regulations; Final Rule and Proposed Rule, 83 Fed. Reg. 25706 (May 1, 2006) (Technical Amendments). These Technical Amendments affect the ultra-low sulfur diesel (ULSD) program, which goes into effect beginning June 1, 2006. However, though the Technical Amendments direct final rule has been published in the Federal Register, it will not go into effect until June 30, 2006, at the earliest. Moreover, if adverse comments are submitted to EPA regarding the Technical Amendments, these regulatory changes will not be final until the issues raised by the comments are addressed and a final rule is promulgated.

Accordingly, EPA has been asked to exercise its enforcement discretion with respect to a number of the Technical Amendment provisions in order to facilitate their implementation until the Technical Amendments go into effect.

Sulfur Test Tolerance

The sulfur content standard under the ULSD regulations is 15 parts per million (ppm) when this fuel is produced or imported. In addition, the current ULSD regulations, at 40 C.F.R. § 80.580(d)(1), provide a 2 ppm adjustment for sulfur test results for ULSD samples collected downstream of the refinery, which generally reflects sulfur test variability:

(d) Adjustment factor for downstream test results. (1) An adjustment factor of negative two ppm sulfur shall be applied to the test results from any testing of motor vehicle diesel fuel ... downstream of the refinery or import facility, to account for test variability, ....

The Technical Amendments would temporarily increase the sulfur test adjustment under 40 C.F.R. § 80.580(d)(1) to 3 ppm through October 14, 2008, after which the sulfur test adjustment would become 2 ppm. As explained in the preamble to the Technical Amendments, some regulated parties are having difficulty achieving a 2 ppm sulfur test variability. *See* 71 Fed. Reg., at 25709. This is likely the result of using older test methods and test equipment, improper staff training, inadequate calibration standards, and improper quality assurance methods. In addition, some refiners expressed concern that without an increased sulfur test adjustment they may unnecessarily have to lower the sulfur level of the diesel fuel they produce to account for greater test uncertainty. These refiners also stated that this would cause them to operate their refineries in a way that might constrain diesel fuel supplies.

The temporary increase in the sulfur test adjustment to 3 ppm is intended to give regulated parties sufficient time to correct their sulfur testing deficiencies in order to achieve a 2 ppm or lower sulfur test variability.

Therefore, to avoid a potential constraint in the available supply of diesel fuel arising from difficulties with the sulfur test variability, I am exercising my enforcement discretion to temporarily apply the 3 ppm sulfur test adjustment as provided for in the Technical Amendments for ULSD samples collected downstream of the refinery.<sup>1</sup> This exercise of enforcement discretion is effective beginning June 1, 2006, and expires on the effective date of the Technical Amendments, or on January 1, 2007, whichever occurs first.

#### Alternate Product Transfer Document Language

The current ULSD regulations at 40 C.F.R. § 80.590(a)(7) require specific statements to be included in product transfer documents (PTDs). Many regulated parties throughout the fuel production and distribution system have informed EPA that the PTD statements required by this section of the regulations are too lengthy for their computerized bill of lading systems to handle. EPA was therefore asked to amend the regulations to allow entities to use shorter statements regarding diesel fuel classifications on PTDs. The technical amendments will accommodate this request by allowing regulated parties to use language that is “substantially similar” to the regulatory language where space is constrained on the PTDs. The rule, as modified, does not change or otherwise modify the information to be included in PTDs, and simply allows shorter

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<sup>1</sup> In addition to this 3 ppm sulfur test adjustment under 40 C.F.R. § 80.580(d)(1), the current regulations also include an additional test result adjustment of 7 ppm that applies at retail outlets and wholesale purchaser-consumer facilities until October 15, 2006, 40 C.F.R. § 80.580(d)(3), and at all other downstream facilities until September 1, 2006, 40 C.F.R. § 80.580(d)(2). This 7 ppm adjustment is unaffected by, and is additive with, the 3 ppm adjustment under today’s exercise of enforcement discretion. As a result, the applicable standard at downstream facilities is 25 ppm (15 ppm + 7 ppm + 3 ppm), until October 15, 2006, at retail outlets and wholesale purchaser-consumer facilities, and until September 1, 2006, at all other downstream facilities.

statements to be used. This will ensure that all necessary information will be included in PTDs. However, the use of shorter statements or alternative language will be allowed under the technical amendments subject to the following conditions: the alternative PTD language is “substantially similar” to the PTD statements set forth in the regulations, space is “constrained” on the PTDs, and the language has been approved by EPA.

PTDs play an essential role in assuring the integrity of fuel as it moves through the distribution system. Distributors and retailers rely on PTDs to assure, for example, that the correct fuel is loaded into the proper tanks, and to reject improper fuel deliveries. Because of space limitations on some bill of lading systems, compliance with the current rule could prevent essential information from appearing on PTDs, thereby increasing the likelihood of misfueling or other mishandling. The technical amendment addresses this by proposing to revise 40 C.F.R. § 80.590(a)(7) to allow the use of EPA-approved alternative language, to assure that all necessary information appears on PTDs.

Therefore, to ensure the safe distribution of diesel fuel, I am exercising my enforcement discretion to temporarily allow use of EPA-approved alternative language as provided in proposed 40 C.F.R. § 80.590(a)(7). This exercise of enforcement discretion is effective beginning June 1, 2006, and expires on the effective date of the Technical Amendments, or on January 1, 2007, whichever occurs first.

#### Alternative Affirmative Defenses for Conductivity Additives and Red Dye

The current ULSD regulations provide that diesel fuel additives having a sulfur content greater than 15 ppm may be used if certain conditions are met. See 40 C.F.R. §§ 80.521 and 80.591. The primary reason for allowing such additives is that conductivity additives, which are added at the terminal as the fuel is delivered into the tank truck, are essential to protect against static-initiated fires when diesel fuel is introduced into a tank truck compartment that previously contained gasoline. Currently, the sulfur content of all available conductivity additives exceeds 15 ppm. However, these additives are blended into diesel fuel in minute quantities so that the finished fuel does not exceed the 15 ppm limitation.

The party that blends the additive is responsible for assuring that the finished fuel is compliant with the ULSD sulfur standard. If a violation of the standard is discovered, each party in the distribution system is deemed liable for the violation. However, the regulations provide a defense for a distributor if it can establish, inter alia, that it conducted a quality assurance sampling and testing program as provided by the regulations. See 40 C.F.R. §§ 80.613(d). For blenders of additives having a sulfur content greater than 15 ppm, this defense element would normally include testing a sample of the diesel fuel after the additive is blended, demonstrating that the fuel meets the ULSD standard. However, such sampling and testing is very difficult and expensive because additives are normally blended into the diesel fuel as it is being delivered into a tanker truck. This could discourage the use of additives that are important to safety, such as conductivity additives.

To facilitate the use of conductivity additives, the current regulation provides for an alternative to the sampling and testing defense element for parties that blend diesel fuel conductivity additives with a sulfur content greater than 15 ppm, but that contribute no more than 0.05 ppm sulfur to the finished fuel blend. See 40 C.F.R. § 80.614. Under this alternative sampling and testing defense element provision, an additive blender must have a test result for the ULSD prior to additive blending, that demonstrates the sulfur content of the fuel will not exceed the ULSD standard after the additive is blended. In addition, to demonstrate that it is not blending excessive additive into ULSD, the blender must maintain a volume accounting reconciliation (VAR) to track the amount of additive that has been blended.

Following promulgation of the highway and nonroad diesel final rules, EPA has learned that ULSD may have a lower natural electrical conductivity as a side effect of the severe refinery processing necessary to reduce the sulfur content of diesel fuel. Consequently, ULSD may require the use of higher concentrations of conductivity additives to allow for safe operation; in rare circumstances, fuel that is relatively unresponsive to conductivity additives would require the use of high concentrations of such additives (which would result in a sulfur contribution greater than 0.05 ppm to the sulfur content of the finished fuel). Therefore, as explained further in the preamble to the regulatory amendment, the amended rule would allow the use of these alternative sampling and testing defense provisions for the blending of conductivity additives that contribute up to 0.4 ppm sulfur to the finished ULSD. See 71 Fed. Reg. at 25711-25712.

In addition, at the time of the original rulemaking, EPA did not take into account the sulfur content of the red dye required by the Internal Revenue Service (IRS) to be added to non-taxed diesel fuel. This dye cannot currently be manufactured to have a sulfur content of 15 ppm or less. Red dye must be added at the terminal as the fuel is delivered into the tank truck. Thus, compliance with the standard alternative affirmative defense provisions described above (that typically require a post-additive blending sulfur test) would likely represent an unsustainable economic and logistical burden for blenders of red dye. Therefore, to facilitate the use of red dye in non-taxed ULSD, the direct final amendments would alter the alternative affirmative defense sampling and testing provision provisions to allow their use by blenders of red dye provided that the red dye contributes no more than 0.04 ppm to the sulfur content of the finished fuel.

Compliance with the requirements currently in effect, therefore, could present a safety hazard. The technical amendment addresses this by adjusting the amount of conductivity additives to minimize these safety risks, with corresponding adjustments to other provisions in the rule affected by the incremental increase in the sulfur content of the conductivity additives and red dye.

Based upon the foregoing, I am exercising my enforcement discretion to temporarily allow use of larger amounts of conductivity additives and use of the alternative defense provision under 40 C.F.R. § 80.614, as provided in the technical amendments, provided that: the contribution to the sulfur content of ULSD is no more than 0.4 ppm for conductivity additives

and 0.04 ppm for red dye; all applicable provisions of 40 C.F.R. §§ 80.521 and 80.591 are complied with; and the ULSD sulfur standard is not exceeded. This exercise of enforcement discretion is effective beginning June 1, 2006, and expires on the effective date of the Technical Amendments, or on January 1, 2007, whichever occurs first.

#### Requirements for Diesel Fuel in California

The ULSD regulations include a number of requirements that are intended to ensure an adequate supply of ULSD. Thus, 40 C.F.R. § 80.530, in general, requires that 80 percent of the highway diesel fuel produced by each refiner must be ULSD. In addition, the designation and tracking (D&T) requirements of 40 C.F.R. §§ 80.597 through 80.604, in general, are intended to ensure this same percentage of ULSD is maintained as the fuel moves through the distribution system. These D&T requirements apply nationwide. However, as explained in the preamble to the Technical Amendments, California state regulations require that all highway diesel fuel used in that state must be ULSD, so the D&T requirements are unnecessary to ensure an adequate percentage of ULSD in California. See 71 Fed. Reg., at 25710 through 25711.

EPA has concluded that imposition of the D&T requirements in California would result in substantial economic burdens on regulated parties in that State without any corresponding air quality benefits. In addition, imposition of these requirements in California would impose a substantial unwarranted burden on EPA to receive and evaluate the reports submitted from regulated parties in California.

As a related matter, the diesel pump labeling requirements of 40 C.F.R. §§ 80.570 through 80.574 apply nationwide, but the pump labeling requirements promulgated by the State of California are sufficient to ensure the proper use of motor vehicle diesel fuel sold within California. As a result, the Technical Amendments also would exempt regulated parties in California from the federal pump labeling requirements.

Therefore, the Technical Amendments would add 40 C.F.R. §§ 80.616, relating to diesel fuel intended for use within the State of California that satisfies the requirements of Title 13, California Code of Regulations, Sections 2281-2285 (California diesel fuel). This section would exempt California diesel fuel from the D&T requirements for designation, PTDs, record keeping and reporting, and the diesel pump labeling requirements. In addition, the Technical Amendments would add 40 C.F.R. § 80.617 related to California diesel fuel that is distributed or sold outside the State of California, to ensure that this fuel is properly included in the D&T accounting requirements that apply outside the State of California.

Based upon the foregoing, I am exercising my enforcement discretion to temporarily allow California diesel fuel that is sold, intended for sale, or made available for sale as a motor fuel in the State of California to not meet certain requirements as specified in proposed 40 C.F.R. § 80.616, as follows:

- The pump labeling requirements 40 C.F.R. §§ 80.570;
- The PTD requirements of 40 C.F.R. § 80.590, provided the PTD identifies the fuel as specified in proposed 40 C.F.R. § 80.616(c);
- The designation requirements of 40 C.F.R. § 80.598, provided the fuel meets the conditions specified in proposed 40 C.F.R. § 80.616(d);
- The volume balance requirements of 40 C.F.R. § 80.599;
- The record keeping requirements of 40 C.F.R. § 80.600;
- The reporting requirements of 40 C.F.R. § 80.601; and
- The record keeping requirements of 40 C.F.R. §§ 80.592 and 602, with the exceptions specified in proposed 40 C.F.R. § 80.616(h).

In addition, I also am exercising my enforcement discretion to temporarily allow California diesel fuel to be distributed or sold outside the State of California as specified in proposed 40 C.F.R. § 80.617, provided that the following conditions are met:

- The designation requirements in proposed 40 C.F.R. §§ 80.598(b)(2)(iii), 80.598(b)(3)(iv), and 80.598(b)(9)(xiv); and
- The record keeping requirements in proposed 40 C.F.R. §§ 80.600(b)(1)(i)(E), 80.600(b)(1)(ii)(I), and 80.600(n).

This exercise of enforcement discretion is effective beginning June 1, 2006, and expires on the effective date of the Technical Amendments, or on January 1, 2007, whichever occurs first.

#### Designate and Track Requirements for Biodiesel

The ULSD regulations include provisions that are intended to ensure an adequate supply of ULSD throughout the distribution system. Thus, 40 C.F.R. § 80.530 generally requires that 80 percent of the highway diesel fuel produced by each refiner must be ULSD (and 20 percent may be 500 ppm low sulfur diesel (LSD)), and 40 C.F.R. § 80.527 restricts the volume of ULSD that downstream parties can downgrade to 500 ppm LSD. The ULSD regulations also require parties that store or transport diesel fuel to register and comply with a number of product transfer document (PTD) and reporting requirements under the designate and track (D&T) provisions in order to ensure compliance with the downgrading restrictions under 40 C.F.R. § 80.527. See, e.g., 40 C.F.R. §§ 80.590, 80.597, and 80.598.

Biodiesel does not raise downgrading concerns, however, and, in general, can be used to manufacture ULSD or 500 ppm LSD without restriction. For this reason, the Technical Amendments exempt biodiesel from the downgrading restrictions under 40 C.F.R. § 80.527, provided the fuel contains at least 80 percent biodiesel (B80). Nevertheless, under the Technical Amendments, most parties that store or transport biodiesel must meet the D&T requirements so that the fuel volumes contained in D&T reports submitted to EPA under 40 C.F.R. § 80.601 can be reconciled.

The Technical Amendments create additional exemptions for certain parties that receive or deliver fuel that is 100 percent biodiesel (B100). Information about B100 is unnecessary for purposes of reconciling D&T reports submitted to EPA. As a result, the Technical Amendments exempt from all D&T requirements parties that receive or deliver only B100, provided the party does not transfer B100 to another party that otherwise is subject to the D&T requirements.<sup>2</sup>

Based upon the foregoing, I am exercising my enforcement discretion to temporarily allow parties that store or transport biodiesel intended for use as a motor vehicle fuel to not meet the downgrading restrictions under 40 C.F.R. § 80.527. This exercise of enforcement discretion is further contingent on:

- The fuel must be biodiesel as defined in proposed 40 C.F.R. § 80.2(sss);
- The fuel must be identified as non-petroleum diesel (NP diesel) in PTDs under 40 C.F.R. § 80.590; and
- The fuel is designated as NP diesel under 40 C.F.R. § 80.598.

I am further exercising my enforcement discretion to temporarily allow parties that deliver or receive fuel that is 100 percent biodiesel (B100) to not meet the D&T requirements

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<sup>2</sup> The Technical Amendments define B100 as fuel that is excluded by the Internal Revenue Service (IRS) from the payment of federal excise taxes when the fuel leaves the terminal, under IRS regulations at 26 C.F.R. § 4081-1(b). B100 is unique among diesel fuels in that the IRS allows B100 to travel below the terminal level without federal excise taxes having been assessed. In contrast, IRS requires that when all other diesel fuel is dispensed from the terminal either the federal excise tax must be assessed (for diesel fuel intended for use in highway motor vehicles), or the diesel fuel must be dyed (for diesel fuel intended for a non-taxed purpose, such as use in nonroad vehicles). In the case of B100, under IRS rules, excise taxes are due when this fuel is used to fuel a motor vehicle.

Thus, proposed 40 C.F.R. § 80.597(c)(5) creates an exception from the D&T registration requirements for parties that deliver or receive only fuel that is an excluded liquid under 26 C.F.R. § 4081-1(b), provided the party does not transfer B100 to another party that is subject to the D&T requirements.

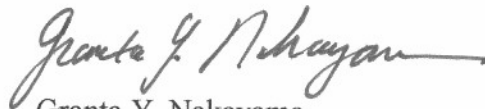
under 40 C.F.R. §§ 80.590 through 604, provided that the party does not transfer any B100 to another party that is subject to the D&T requirements.

This exercise of enforcement discretion is effective beginning June 1, 2006, and expires on the effective date of the Technical Amendments, or on January 1, 2007, whichever occurs first.

My exercise of enforcement discretion as set forth in this letter is intended to ensure an adequate supply of ULSD is safely distributed pending the effective date of the Technical Amendments, and will not result in adverse environmental effects.

If you have any questions regarding this matter, you may call Erv Pickell, Fuels Team Leader, at (303) 236-9506.

Sincerely,

A handwritten signature in black ink, appearing to read "Granta Y. Nakayama", followed by a horizontal line.

Granta Y. Nakayama  
Assistant Administrator